93-549

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LIFSCHULTZ FAST FREIGHT, INC.,

Plaintiff-Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, YELLOW FREIGHT SYSTEMS, INC. and ROADWAY EXPRESS, INC.,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether for the purpose of granting a motion for summary judgment and avoiding a trial on the merits guaranteed by the Seventh Amendment to the Constitution a District Court is empowered under Federal Rule of Evidence 104(a) or this Court's ruling in Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) to determine that a party's principal witnesses are incredible, thereby ruling their testimony of antitrust conspiracy inadmissible and insufficient?

2. Whether the "filed rate" doctrine enunciated in Keogh v. Chicago & N.R. Co., 260 U.S. 156 (1922) bars an antitrust action by one competitor against another?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Lifschultz Fast Freight, Inc. provides the following corporate information. Lifschultz Fast Freight, Inc. is wholly owned by Lifschultz Industries, Inc.

THE PARTIES

The parties before this Court are those set forth in the caption.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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LIFSCHULTZ FAST FREIGHT, INC., PETITIONER

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, YELLOW FREIGHT SYSTEMS, INC. and ROADWAY EXPRESS, INC., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lifschultz Fast Freight, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of

Appeals (App., infra, A-1 to A-6) is reported at 998 F.2d 1009 (4th Cir. S.C. 1993).

The opinion of the District Court for the District of South Carolina (App., infra, A-7 to A-44) is reported at 805 F.Supp 1277 (D.S.C. 1992).

JURISDICTION

The court of appeals entered its judgment on July 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence, Rule 104(a), provides:

Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making

its determination it is not bound by the rules of evidence except those with respect to privileges.

Federal Rules of Evidence, Rule 801(d)(2), provides:

Statements which are not hearsay. A statement is not hearsay if

* * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of

a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

The petitioner brought this action alleging that the respondents, along with the International Brotherhood of Teamsters and others, conspired to destroy his business as well as that of other competing regional carriers. Specifically, he charged that respondents violated the Sherman Antitrust Act, 15 U.S.C.A. Sections 1 and 2 (West Supp. 1993), the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. Sections 1961 to 1968 (West 1984 Supp. 1993), and the South Carolina Unfair Trade Practices Act (SCUTPA, S.C. Code Ann, Sections 39-5-10 to 160 (Law Co-op 1985) by conspiring to eliminate competition in the trucking industry. After extensive and protracted discovery proceedings, the district court, largely

on the basis of deposition testimony, granted summary judgment in favor of the respondents. The court reached its finding by declaring petitioner's two principal witnesses to be incredible and employing the hearsay rule to grant respondents' motion to exclude their testimony pursuant to Federal Rule of Evidence 104(a). Moreover, the court found that the testimony, even if considered, was simply too incredible under Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) to support the inference that, under the circumstances presented, an antitrust conspiracy was reasonable and plausible. Alternatively, the District Court concluded that petitioner's claims were barred as impermissible collateral attacks on rates and tariffs set by the Interstate Commerce Commission, interpreting this Court's so-called

"filed rate" doctrine to apply to competitors. The Court of Appeals affirmed in a per curiam opinion finding the District Court's opinion to be "thorough and well reasoned" but offering no other analysis. The opinion also reiterated the District Court holding "that Lifschultz had not presented sufficient credible evidence of a conspiracy to qualify for the conspirator exception to the hearsay rule under Federal Rule of Evidence 801(d)(2)(E) "and that Lifschultz' claims were barred by the Keogh doctrine."

Established in 1899, Petitioner Lifschultz was, prior to 1980, a freight forwarder which relied "on other common carriers, primarily railroads, to move its freight between cities.[1] In 1980,

[1] This statement of facts, based upon the record compiled during discovery proceedings, is required to be taken as true for the purpose of the

Lifschultz became a motor common carrier and moved the freight between cities itself. Lifschultz and the respondents were competitors in the trucking industry in that portion of the trucking market which specialized in the carrying of 'less than truckloads' ("LTL") of freight.

Beginning in approximately 1963 the respondents and other trucking companies entered into a conspiracy with the International Brotherhood of Teamsters (hereinafter "Teamsters" or "Teamsters Union") to consolidate the trucking industry in the United States by destroying competing regional carriers such as the petitioner. The goal of this

District Court's consideration of a motion for summary judgment. As shown below, Judge Herlong's decision amounted to a thinly veiled attempt to sidestep through the application of Federal Rule of Evidence 104(a) this long settled principle.

conspiracy not only benefitted the respondents but also benefitted the Teamsters who sought to increase their powers by negotiating with only a few trucking companies in order to control all major trucking in the United States.

To accomplish this conspiracy, the respondents, with the Teamsters, created a "hit list" of the small regional carriers selected to be destroyed. Lifschultz was prominently placed on that list. Those on the "hit list" became the object of illegitimate Teamster strikes and interruptions of service. The Teamsters, greased with bribe payments from the respondents and the prospects of greater national power, gave the respondents numerous labor concessions, thereby providing them with an overwhelming unfair competitive cost advantage over the small regional carriers they sought to eliminate. At

the same time the respondents collectively set rates through rate bureaus which caused the rate bureaus to hold down LTL rates in the eastern central United States. The low rates combined with the increased costs to the truckers on the "hit list" -- caused by unjustified Teamsters labor problems -- created a price squeeze on these carriers making it impossible for them to compete against the respondents.

As a further part of this conspiracy, after 1980, the respondents with the Teamsters assistance were able to charge their customers (i.e., shippers) less than the tariffs established by the ICC and rate bureaus through fraudulent methods such as misclassifying freight and providing bogus pricing allowances. The respondents also engaged in predatory pricing -- charging shippers below cost

which they could in turn subsidize from profitable traffic lanes -- in order to drive out the targeted companies on the hit list. At the end of the day the conspiracy was completely successful. A once competitive industry is now dominated by the three respondents. Most of the small original carriers, including Lifschultz, have been put out of business.

Lifschultz' principal evidence of the above comes from two insider witnesses to the Teamsters' side of the conspiracy. One was Glenn Hall, a former Roadway employee and an intimate of former Teamster President, Jimmy Hoffa, who was the catalyst behind this conspiracy. Hall had numerous direct conversations about the conspiracy with Hoffa as well as two other Teamster Presidents -- Frank Fitzsimmons and Roy Williams and other high ranking Teamsters

officials, officers and employees of Roadway and Yellow. Most importantly, Hall was personally involved in executing certain actions in furtherance of the conspiracy such as facilitating labor concessions to Yellow and perpetrating fraudulent pricing practices to undercut the pricing of the victim carriers.

Lifschultz' other witness, Ralph Picardo was an associate of Anthony Provenzano and others who ran Teamster Local 560 in Union City, New Jersey ("Local 560"). While working with Provenzano and Local 560, Picardo was repeatedly told about the goals of the conspiracy and observed its methods. Most significantly, Picardo was personally involved in providing labor concessions to Roadway and had a conversation with a Yellow Vice President about payoffs to the Teamster Union in return for labor concessions. After

breaking with his associates in Local 560 in 1975 and entering the United States Justice Department's Witness Protection Program, Picardo worked under assumed names for all three respondents from 1977 to the early 1980s and observed first hand the type of conduct he describes as being part of the conspiracy with respondents.

David Lifschultz, the President of Lifschultz, testified as a corroborating witness that he met with a high ranking Teamster official, Abe Gordon, in New York who admitted to him the existence of the conspiracy. Petitioner also produced a salesperson for Lifschultz, who testified that she was personally aware of the secret discounts and kickbacks given by the respondents to shipping customers and two trucking company heads -- who testified that their companies were also destroyed by the respondents

and the Teamsters in the 1970s. In addition, petitioner produced economic evidence which showed that over the time of the conspiracy respondents, through a price squeeze on the regional carriers and predatory pricing, gained a concentration of the LTL industry at the same time as Lifschultz experienced a steady loss of its business to respondents and ultimately went out of business.

REASONS FOR GRANTING THE PETITION

1. In granting summary judgment for the respondents, the District Court relied upon the Fourth Circuit's opinion in Precision Piping Instruments v. E.I. DuPont deNemours & Co., 951 F.2d 613, 621 (4th Cir. 1991) which held that under Rule 104(a) "the trial court may weigh the credibility... of evidence... when making a preliminary determination as to

the existence of a conspiracy necessary to invoke Rule 801(d)(2)(E)." The Fourth Circuit's ruling is directly at odds with the Ninth Circuit's ruling in In Re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990) cert. denied 111 S.Ct. 2274 (1991) ("Pre-Trial"). In that case the Ninth Circuit held that the trial court could not properly weigh a witness' credibility in making a preliminary determination under Rule 104(a) on the existence of a conspiracy. The Ninth Circuit specifically "reject[ed] the district court's suggestion that... [the witness'] testimony could be disregarded because it had been 'substantially discredited'" and at the same time recognized that "[i]t is well established that [c]redibility determinations... are jury functions, not those of a judge, whether he is ruling on

a motion for summary judgment or for a directed verdict'", Id. at 459, quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986).

In addition to there being a division in the circuit courts on this issue, this issue has ramifications beyond the civil context in this case. Rule 104(a) determinations on conspiracy are most frequently made in criminal cases. Accordingly, every time the government prosecutes a criminal case with an accomplice witness or a witness with an unsavory background subject to intense impeachment, the district court judge under the Fourth Circuit interpretation of Rule 104(a) would have veto power to keep the jury from passing on the credibility of that witness[2].

[2] It is a particularly egregious result in this case since witness Picardo had previously testified and had been tested on cross-examination before seven

Indeed, the First Circuit in United States v. Barletta, 652 F.2d 218, 219 (1st Cir. 1981) recognized that this issue raises constitutional concerns over the proper role of the jury in our system of justice. In Barletta the First Circuit held that in order "to preserve the proper allocation of responsibilities between judges and juries... the court's role... is not to make a factual determination, but rather to rule as a matter of law whether a reasonable jury could properly find the ultimate fact in favor of the proponent of the evidence." Id. The court further held that "to hold otherwise - to deny the jury the possibility of making a particular factfinding simply because the court

different juries in seven separate federal criminal trials (and had been believed) prior to the pre-trial finding by Judge Herlong, who had never laid eyes on him, that his testimony was incredible.

would determine the fact otherwise - might in criminal cases deprive a defendant of his Sixth Amendment right to have his case tried to a jury... The 'preliminary' question to be decided by the court under Rule 104(a) is properly understood in such instances to be the question of law whether a reasonable jury could find a particular fact." Id.[3]

[3] In Bourjaily v. United States, 483 U.S. 171, 181 (1987) this Court held that in determining whether a statement is admissible as a Co-conspirator's statement under Rule 801(d)(2)(E) the trial court pursuant to F.R. Evd. 104(a) "may examine the hearsay statements sought to be admitted." Id. Thus, In Bourjaily this Court held that "there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy" 483 U.S. at 181 (emphasis added). However, "the credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact which it seeks to prove", United States v. Welsh, 774 F.2d 670, 672 (4th Cir. 1985) (emphasis added). Thus, the district court in determining whether or not there is sufficient evidence of a conspiracy under Fed. R. Evid. 104(a) is limited to

As stated above, in granting summary judgment for the respondents the District Court concluded that petitioner's key witnesses Hall and Picardo were "simply too incredible", Lifschultz, 805 F.Supp 1277, 1285, (D.S.C. 1992). The District Court then relied upon this Court's decision in Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) to empower it on a summary judgment motion to determine if the evidence presented by Lifschultz was reasonable and plausible. The Fourth Circuit's affirmance of the District Court is at direct odds with the Ninth Circuit's decision in Pre-trial cited above. In that case the Ninth Circuit specifically held that Matsushita only

> weighing the probative value of the co-conspirator's statement on its face in the light most favorable to the plaintiff without any regard to the credibility of the witness.

permits an inquiry into the reasonableness and plausibility of the conspiracy "where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy" Id. at 440. Thus, "Matsushita authorizes an inquiry on summary judgment into the 'implausibility' of inferences from circumstantial evidence, particularly in antitrust conspiracy cases, not an inquiry into the credibility of direct evidence". McLaughlin v. Liu, 849 F.2d 1205, 1207 (9th Cir. 1988) Here, Hall and Picardo provided direct testimony on the antitrust conspiracy.

Most significantly, since Matsushita was decided, this Court issued two opinions that are consistent with the Ninth Circuit view. In Eastman Kodak Co. v. Image Technical Services Inc., 112 S.Ct. 2072 (1992) this Court stated that "direct evidence" of "driv...[ing] out

competition" overcomes the economic theorizing based on the circumstantial evidence presented in Matsushita and that Matsushita does not apply to "conduct" such as that alleged here - a labor union joining with truckers in order to raise the costs of competing truckers - which "is facially anticompetitive and exactly the harm that antitrust laws aim to prevent" Id. In Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation, 113 S.Ct. 2578 (1993) this Court cited Eastman Kodak Co. for the propositions that "when the realities of the market and the record facts indicate that it [predatory pricing] has occurred and was likely to have succeeded, theory will not stand in the way of liability."

2. In granting summary judgment for the respondents the District Court held that the "filed rate" doctrine applies to actions by competitors as well as

customers. Lifschultz, 805 F.Supp at 1296. There is also a distinct division among the circuits on this issue. The "filed rate" doctrine was first enunciated by this Court in Keogh v. Chicago & North Western Railway, 260 U.S. 156 (1922). Keogh involved a shipper suing a trucker. The shipper challenged the rates approved by the ICC claiming they had resulted from the truckers anti-competitive activity. This Court denied plaintiff's claim on the basis that "[t]he legal rights of shipper as against carrier in respect to a rate are measured by the published tariff." Id. at 163.

The Second and Third Circuits have held that competitors can bring suit under the antitrust laws without running afoul of the filed rate doctrine. See Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929-31 (2d Cir. 1981). Essential Communications Systems, Inc. v.

Am. Tel. & Tel. Co., 610 F.2d 1114, 1121-22 (3rd Cir. 1979). The one case which extends the "filed rate" doctrine to antitrust suits brought by competitors and relied upon by the District Court is in the Sixth Circuit. See Pinney Dock & Transport Corp. v. Penn Central Corp., 838 F.2d 1445 (6th Cir.) cert. denied sub nom. Pinney Dock & Transport Corp. v. Norfolk & W.R. Co., 488 U.S. 880 (1988). In considering the dispute between circuits, it is likely, based on this Court's decision in Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409 (1986), that this Court would rule similarly to the Second and Third Circuits. In Square D, this Court appeared to narrowly circumscribe its decision in Keogh when it stated that "Keogh simply held that an award of treble damages is not an available remedy for a private shipper claiming that the

rates submitted to, and approved by, the ICC was the product of an antitrust violation. Id. at 422. However, this case squarely presents this Court with the opportunity to settle the conflict among the circuits over whether and how far Keogh should be extended.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted.

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